IN THE

Supreme Court of the United States

October Term, 1978

No. 78-525

WILMORITE, INC., FAYETTEVILLE PLAZA, INC. and JAMES P. WILMOT, d/b/a FAYETTEVILLE MALL,

Petitioners,

v.

EAGAN REAL ESTATE, INC., EAGAN REAL ESTATE MANAGEMENT CORP., EAGAN REAL ESTATE, LEO T. EAGAN, WILLIAM EAGAN, EDWARD EAGAN, KIMBROOK REALTY, KIMBROOK CORP., CFB DEVELOPMENT CORP., CAMPERLINO AND FATTI BUILDERS, INC., FRANK FATTI, WILLIAM J. CAMPERLINO, WILLIAM A. BARGABOS, PYRAMID DEVELOPMENT, INC., PYRAMID BROKERAGE COMPANY, INC., MICHAEL FALCONE, ALLIED STORES CORPORATION, DEY BROTHERS AND CO., INC., WINMAR COMPANY, INC., BARNEY DEASY, PAUL D. LONERGAN, KATHERINE M. SHEA, JOHN MURPHY, EARL OOT, ROGER SMITH, ARTHUR REED and DAVID C. MURRAY,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI OF WILMORITE, INC. *ET AL.* FILED ON BEHALF OF EAGAN REAL ESTATE, INC., EAGAN REAL ESTATE MANAGEMENT CORP., EAGAN REAL ESTATE, LEO T. EAGAN, WILLIAM EAGAN, EDWARD EAGAN, KIMBROOK CORP., PAUL D. LONERGAN, KATHERINE M. SHEA and JOHN MURPHY

SIMON H. RIFKIND
Attorney for Respondents Eagan Real Estate, Inc., Eagan Real Estate Management Corp., Eagan Real Estate, Leo T. Eagan, William Eagan, Edward Eagan, Kimbrook Corp., Paul D. Lonergan, Katherine M. Shea and John Murphy
345 Park Avenue
New York, New York 10022
(212) 644-8602

PAUL, WEISS, RIFKIND, WHARTON & GARRISON
MARK H. ALCOTT
NEAL JOHNSTON
Of Counsel

TABLE OF CONTENTS

TABLE OF AUTHORITIES

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This brief is submitted in opposition to the petition for a writ of certiorari, filed by petitioners Wilmorite, Inc. *et al.*, to review the judgment of the United States Court of Appeals for the Second Circuit entered on June 30, 1978.

This is an antitrust action in which interstate real estate developers seek $72,000,000 in damages because residents of upstate New York, assisted and encouraged by some respondents, opposed efforts to construct two large shopping centers in their residentially-zoned neighborhoods by recourse to the zoning laws. Their opposition consisted primarily of litigating in court the validity of amendments to zoning ordinances obtained by petitioners. The petition for certiorari focuses almost exclusively on this litigation activity. The complaint also alleged that respondents generated adverse publicity and promoted opposition to the ordinances in hearings before local zoning officials.

The courts below held, without dissent, that such activity was outside the reach of the antitrust laws, under the well-established *Noerr-Pennington* doctrine.[1] Accordingly, summary judgment was entered and the complaint was dismissed. The petition for a writ of certiorari offers no reason why this judgment should be reviewed, much less reversed. The conduct alleged falls squarely within the principles of *Noerr* and *Pennington*, the lower courts have consistently applied those principles to such conduct, and no conflict among the circuits or special circumstances are suggested. The petition should be denied.

Statement of the Case

Petitioners are owners and developers of regional shopping centers both in and outside of New York State. The 27 named respondents, defendants below, for the most part are individuals and business entities active in the Syracuse

1. *Eastern R. R. Presidents Conf.* v. *Noerr Motor Freight, Inc.*, 365 U.S. 126 (1961); *United Mine Workers* v. *Pennington*, 381 U.S. 657 (1965).

area; they include local real estate developers in competition with petitioners, their shareholders and employees, a department store chain, two planning consultants and a local doctor who headed a citizens committee in opposition to one of petitioners' proposed new shopping centers.[2]

In 1965, petitioners acquired a tract of land in Onondaga County (on which they eventually built Fayetteville Mall Shopping Center). In June of 1965, they obtained a zoning change from the Town Board and soon thereafter applied for a building permit which was approved by the Board of Appeals the very next day. Litigation was promptly commenced by local citizens challenging the zoning change.

In this first example of what petitioners argued below was a "pattern of baseless litigation," the citizens won: The zoning application had been granted by an improper procedure and on insufficient data, and the local board of appeals had exercised discretion beyond its power in affirming the decision, *Beneke* v. *Bd. of Appeals*, 51 Misc. 2d 20, 25, 273 N.Y.S.2d 121, 127 (Sup. Ct. Onondaga Co. 1966). Petitioners never appealed this adverse decision. Nowhere in their petition to this Court do petitioners mention this opening round in the "multiple repetitive zoning lawsuits."

Later, a second proposed zoning ordinance was submitted, but the Town Board rejected it. Various respondents were involved in marshalling local opposition to that

2. This brief is submitted on behalf of the Eagan group of respondents. They owned and operated shopping centers located near the two sites petitioners proposed to develop. The Allied respondents were major tenants of the Eagans. The Kimbrook respondents owned and operated a Planned Unit Development in Northern Onondaga County near one of petitioners' sites and allegedly are controlled by the Eagans.

rejected ordinance, just as they had been involved in the successful *Beneke* action.[3]

Petitioners' third attempt to obtain zoning relief succeeded at the legislative level. Promptly, thereafter, 148 area residential property owners commenced an action for a judgment declaring this rezoning to be invalid. *Albright, et al.* v. *Town of Manlius, et al.* A parallel action, *Schaff* v. *Town of Manlius, et al.*, was later commenced seeking similar relief; the two actions were then consolidated.

Once again, the citizens prevailed; the trial court held that the zoning amendments were not in conformity with a comprehensive plan and that notice precedent to their enactment was insufficient. Petitioners appealed to the State Appellate Division, but the five judges of that court unanimously affirmed the trial court's finding that the zoning change was illegal by reason of inadequate notice. *Albright* v. *Town of Manlius,* 34 A.D.2d 419, 312 N.Y.S.2d 13 (4th Dept. 1970).

Petitioners did not prevail until they reached the New York Court of Appeals, which, by a 4 to 2 vote, held that notice had been adequate. *Albright* v. *Town of Manlius,* 28 N.Y.2d 108, 268 N.E.2d 785, 320 N.Y.S.2d 50 (1971). Subsequent to this final decision, petitioners proceeded to construct their Fayetteville Mall.

None of the respondents appeared as parties in any of these actions, although they did provide the citizen plaintiffs with the organization, energy, experts, and financing necessary to frame and pursue their efforts to obtain judicial relief against the zoning changes petitioners had procured.

3. In the Second Circuit, petitioners argued that respondents' successful efforts to oppose the enactment of zoning ordinances were unlawful under the Sherman Act. That contention has been abandoned. It is clear under both *Noerr* and *Pennington* that respondents' efforts to influence zoning legislation did not violate the antitrust laws.

In 1975, ten years after the first Fayetteville Mall litigation commenced, petitioners obtained a zoning change for their proposed Great Northern Mall, an entirely separate project. Kimbrook Realty, one of the respondents, thereafter mounted, in its own right, a court challenge to this new amendment. It brought a so-called Article 78 proceeding, N.Y. Prac. Law §§7801-7806 (McKinney), which the court dismissed on technical grounds without reaching the merits. (*Kimbrook Realty* v. *Onondaga County Planning Board,* New York State Supreme Court decision filed on Feb. 7, 1977.) It also sought a declaratory judgment, but that action was voluntarily discontinued by Kimbrook after subsequent local zoning resolutions had rendered the suit moot. Thus, the merits were reached in neither Kimbrook action.

Petitioners allege, and for purposes of the decisions below it was taken as true, that the two Kimbrook litigations were brought at the direction of the Eagans, and were encouraged and financed by them and other respondents. It is not alleged that Kimbrook was not itself interested in the outcome of the litigation it commenced.

Petitioners also complain that respondents conspired to oppose, by political means, development by unidentified third parties of the Pyramid Mall East, a totally unrelated shopping center. No such allegations were contained in the dismissed complaint, but were mentioned the first time only in the rejected proposed amended complaint (see *infra* p. 7). In any case, petitioners had no interest whatsoever in the Pyramid Mall matter.

Proceedings Below

Petitioners brought this action in the United States District Court for the Northern District of New York. They alleged that respondents' involvement in the two sets of state court litigations challenging the zoning amendments, and their opposition to legislative enactment of the amendments, constituted an illegal conspiracy in violation of the Sherman Act, 15 U.S.C. §§1, 2.

The District Court (Hon. Edmund Port, Senior Judge) granted summary judgment[4] to respondents on the ground that their alleged activities were not prohibited by the Sherman Act, as this Court interpreted that Act in *Noerr-Pennington* and *California Motor Transport Co.* v. *Trucking Unlimited,* 404 U.S. 508 (1972).

Specifically, the District Court held that the *Noerr-Pennington* doctrine protected respondents' attempts to influence the action of any branch of the government.

> "This protection is afforded, even if such action is anti-competitive or monopolistic, . . ." (p. A-18).[5]

Accepting the truth of petitioners' allegation that respondents were motivated by an anticompetitive intent, the court concluded:

4. Respondents had moved to dismiss the complaint pursuant to Fed. R. Civ. P. 12 (b)(6); the District Court and the parties treated the motion as one for summary judgment because certain respondents submitted affidavits. For purposes of the motion, the allegations of the complaint were accepted as true by the courts below.

5. Throughout this brief, pages in the Appendix to the instant petition are referred to by the prefix "A"; pages in the petition itself are referred to by the prefix "Pet."

> "The First Amendment right of petition guarantees all citizens the right to appeal to the legislature or the judiciary. This right is not conditioned upon motive." (A-19).

Petitioners thereafter sought leave, pursuant to Fed. R. Civ. P. 59(e), to amend the judgment to permit them to replead. They attached to their motion a 129-page proposed amended complaint in an effort to cure the deficiencies of the original 57-page complaint.[6] Included in the proposed pleading were alleged transcripts of attorney/client telephone conversations concerning the underlying state court litigations. The trial court reviewed this elephantine proposed new pleading and concluded that the proposed amended complaint added nothing but length to the original complaint. Petitioners' motion was denied.

Petitioners' appeal to the Second Circuit was unavailing. That court unanimously affirmed summary judgment on the strength of Judge Port's opinion. On the subordinate issue of amendment, the Court of Appeals concluded that there was no abuse of discretion by the District Court in denying leave to file an amended complaint because the respondents' conduct, even under the facts and theory alleged in the new pleading, did not give rise to liability under the antitrust laws.

6. During oral argument on the motion to dismiss, petitioners' counsel conceded that there were no non-evidentiary facts which could be added to the pleadings, even were he given a chance to replead.

I

The entry of summary judgment does not merit further review because respondents' alleged activities fall squarely within the scope of the *Noerr-Pennington* doctrine.

The petition presents no issues worthy of review by this Court. It points to no conflict among the circuits concerning the *Noerr-Pennington* doctrine. It identifies no confusion among the lower courts as to the proper interpretation of that doctrine. It presents no facts, peculiar to this case, warranting a re-examination of that doctrine.

Lacking such grounds for review, petitioners attempt to characterize this as a case involving the scope of antitrust exemptions. They cite *City of Lafayette, La.* v. *Louisiana Power & Light Co.*, 435 U.S. 389, 98 S. Ct. 1123 (1978) for the proposition that a heavy burden is placed upon those who would escape the strictures of antitrust by resorting to "immunity" (Pet. p. 15). But respondents do not claim, and the courts below did not impose, any "immunity." As this Court held in *Noerr*, Congress never intended, in adopting the antitrust laws, to abridge the right of petition. The Sherman Act simply does not prohibit competitors from combining to seek governmental relief, notwithstanding that such efforts may have adverse affects upon competition. This is true whether the relief so sought be legislative, administrative, or judicial. *California Motor Transport* v. *Trucking Unlimited*, 404 U.S. 508 (1972). If Congress did attempt to bar such petitioning, serious First Amendment problems would arise, but it has never been the intention of Congress so to cut off

access to itself, the courts or any other government agency. In short, this Court has already resolved petitioners' "immunity" contention.

Moreover, the doctrines advanced in *Noerr* and its progeny are clear and easy to apply. Petitioners assert without discussion that "the *Noerr* exemption remains in a state of confusion and disarray . . .," and make footnote reference to some 14 recent lower court cases in which *Noerr* is cited, apparently to prove the confusion they proclaim (Pet. pp. 24-25 n. 6). But petitioners nowhere identify the "confusion" which concerns them, and examination of the 14 cases cited demonstrates that, contrary to petitioners' characterization, the lower courts have well understood *Noerr* and have applied it consistently.[7]

Indeed, every court ever to consider the question has held that *Noerr-Pennington* and *California Motor Transport* protect litigation challenging shopping center rezoning. *Bob Layne Contractor, Inc.* v. *Bartel*, 504 F.2d 1293 (7th Cir. 1974); *Ernest W. Hahn, Inc.* v. *Codding*, 423 F. Supp. 913 (N.D. Cal. 1976); *Bethlehem Plaza* v. *Campbell*, 403 F. Supp. 966 (E.D. Pa. 1975); *Bracken's Shopping Center, Inc.* v. *Ruwe*, 273 F. Supp. 606 (S.D. Ill. 1967). That is all that is involved here. This petition does not

7. Petitioners also cite *Otter Tail Power Co.* v. *U.S.*, 360 F. Supp. 451 (D. Minn. 1973), *aff'd* 417 U.S. 901 (1974) as if it worked some radical revision of *Noerr*. It does not. As the District Court held, the facts of *Otter Tail* are readily distinguishable from the facts at hand; *Otter Tail* involved a scheme of repetitive litigation practiced as "part of a larger unlawful scheme characterized by *monopolistic* practices" (emphasis supplied) (p. A-29). Petitioners make no effort to challenge the District Court's careful analysis; they just ignore it.

present a novel issue, or a complex issue, or an issue with which the courts have had difficulty.

The courts below found that the complaint, for all its bulk, alleges no more than efforts to petition the government; they held that, according to *Noerr-Pennington,* such efforts were not illegal. Their readings of *Noerr-Pennington* are not only correct but also fundamentally consistent with the holdings of every other court which has so far faced analogous facts.

In claiming that respondents' litigation activity violates the antitrust laws, petitioners seek, in effect, to overrule *Noerr-Pennington.* But they offer no reason why that doctrine, based as it is upon sound statutory construction, if not constitutional compulsion, should abruptly be abandoned for their benefit.

Petitioners' contentions

Here, as below, petitioners cloak their effort to escape the consequences of *Noerr-Pennington* by invoking the narrow sham exception identified in *Noerr* and delineated in *California Motor Transport.* But the facts alleged cannot be reconciled with a "sham."

It was noted in *Noerr* that circumstances could arise where an illegal conspiracy amounted in reality to a simple and naked restraint upon competition, even though the formal indicia of petition were preserved. In such a case, the form of petition would be but a sham, and a sham does not immunize anticompetitive conduct.

This abstract possibility was concretely encountered in *California Motor Transport* v. *Trucking Unlimited* 404 U.S.

508 (1972), where it was held that a scheme by certain California truckers to oppose without basis virtually all of their competitors' routine applications for operating rights could constitute an illegal conspiracy. The conspirators pursued their reflexive opposition before the California Public Utilities Commission, the Interstate Commerce Commission and the courts with total indifference to probable cause and total disregard of the merits of their cases—to the point where those authorities were overwhelmed and could not effectively adjudicate the applications. This Court said:

> ". . . the allegations are not that the conspirators sought 'to influence public officials,' but that they sought to bar their competitors from meaningful access to adjudicatory tribunals and so to usurp that decision-making process." (*Id.* at 512).

As the District Court here observed, "access barring is the cornerstone to the sham exception." (p. A-26). But no respondent in this case ever barred petitioners' access to any tribunal; to the contrary, petitioners had full access to government as they required it. The District Court found that there was no access-barring here. Absent access-barring, efforts to influence the government do not give rise to antitrust liability even when those efforts are motivated by a desire to reduce or eliminate competition—and so the courts have always held.

It has also been suggested that when conspirators endeavor to corrupt the governmental process by means of perjury, bribery, misrepresentation or the like, their conduct may amount to access-barring. But the opinion below found:

> "In the instant case [petitioners] have not alleged any unethical or corrupt actions on the part of [respondents] in suing to declare the zoning amendments void. It is not alleged that perjury, bribery, misrepresentations, or any improprieties occurred during the litigation. Mere use of the state courts to challenge zoning amendments . . . cannot be characterized as an abuse of the judicial process. On the contrary, it is one of the facets of the First Amendment right of petition protected by *Noerr*." (pp. A-26-A-27)

Petitioners argue that respondents should nevertheless be denied the constitutional freedoms recognized by *Noerr-Pennington* because (1) none of the respondents was a party to any of the Fayetteville Mall litigations and not all of the respondents were parties to the Great Northern Mall proceedings, and (2) respondents involved themselves in these state court matters with the intention of restraining competition with petitioners. These alleged facts, even when taken as true, do not create a "sham" as that concept has been articulated by any court, including this.

It is of no relevance that not all respondents were parties plaintiff in the state court litigations they assisted.

Petitioners do not even attempt to argue that the underlying state litigations were sham in any intrinsic sense. Clearly the 32 local property owners who brought the first, successful, Fayetteville Mall proceeding and the 149 area residents who brought the later litigations believed themselves to have real and legitimate grievances for which they sought judicial redress.[8]

8. Petitioners suggest that the state court proceedings involve a pattern of repetitive, baseless litigations. In fact, the state court litigations were quantitatively modest and qualitatively strong. The

(footnote continued on next page)

Instead petitioners argue that it was an illegal "misrepresentation of standing" for respondents to organize and assist the Fayetteville state court litigants without themselves stepping forward as plaintiffs (Pet. p. 19).

As to the Great Northern Mall matter, petitioners appear to argue that the failure of the other respondents to join as co-plaintiffs somehow rendered illegal Kimbrook's effort to redress its own grievances.

Petitioners do not cite a single case in support of the proposition that it was illegal for respondents to assist the third parties in litigation, nor do petitioners suggest any misrepresentation of the standing of those persons who actually were plaintiffs in these proceedings.

A similar "third party" argument was raised and rejected in *Noerr* itself as "legally irrelevant" under the Sherman Act, 365 U.S. at 142. This Court found the *Noerr* defendants to have attempted to deceive public officials by making it appear that certain public statements were the spontaneously expressed views of independent persons and civic groups when, in fact, they were largely prepared, produced and paid for by the defendant railroads and their agents. The Court found that conduct to constitute a reprehensible deception, but nevertheless held it to be "of no

state court plaintiffs won the first litigation without appeal. They also won the first two rounds of the second proceeding; petitioners finally prevailed only upon a split Court of Appeals decision. The first Great Northern Mall proceeding was dismissed on procedural grounds and the second was withdrawn by plaintiffs as moot; neither ever reached the merits. As the District Court dryly observed, the facts at hand

> "are hardly the threads from which a 'pattern of baseless, repetitive claims' . . . can be woven" (p. A-28).

consequence so far as the Sherman Act is concerned." (*Id.* at 145.) Here, there is no claim of a comparable deception, since the state court plaintiffs concededly were real parties in interest, advancing actual objectives of their own. Still, even if there had been a deception, it, too, would "be of no consequence so far as the Sherman Act is concerned."

This Court has also held, repeatedly, that individuals have a constitutional right "to engage in association for the advancement of beliefs and ideas" through litigation. *NAACP* v. *Alabama*, 357 U.S. 449, 460 (1958). In *NAACP* v. *Alabama*, the court held members of the NAACP had a constitutional right to associate for purposes which included supporting litigation by third parties, 357 U.S. at 452. Moreover, they had a constitutional right to do so *anonymously*: "This Court has recognized the vital relationship between freedom to associate and privacy in one's associations." 357 U.S. at 462. The First Amendment protects anonymous speech. *Talley* v. *California*, 362 U.S. 60, 64 (1960).

The Court reiterated the constitutional right to finance and assist litigation by third parties in *NAACP* v. *Button*, 371 U.S. 415 (1963) when it struck down a statute which had the effect of forbidding solicitation of lawsuits by the NAACP.

Although the NAACP cases involved litigation to advance political beliefs, the Court was careful to emphasize that "it is immaterial whether the beliefs sought to be advanced by association pertain to political, economic, religious or cultural matters, ..." *NAACP* v. *Alabama*, *supra*, 357 U.S. at 460. *Accord*, *Abood* v. *Detroit Bd. of Educ.*, 431 U.S. 209, 231 & n. 28 (1977); *Stern* v. *United States Gypsum, Inc.*, 547 F.2d 1329, 1343 (7th Cir. 1977).

Petitioners refer in passing to *Ohralik* v. *Ohio State Bar Association*, 436 U.S. 447, 98 S. Ct. 1912 (1978). That decision rejects the proposition that the First Amendment immunizes champerty, but in no way undercuts the basic doctrine of *Button* that one party may assist the litigation of another. Indeed, as stated in *Ohralik*,

> "the rule does not prohibit a lawyer from giving unsolicited legal advice; it proscribes the acceptance of employment resulting from such advice." 98 S. Ct. at 1920.

Here respondents gave the local citizens assistance; they did not accept employment.

This Court has held in three separate decisions that third parties have a constitutional right to finance and assist in litigation to vindicate purely economic rights—the recovery of money damages for work-related injuries—because "the First Amendment does not protect speech and assembly only to the extent it can be characterized as political." *United Mine Workers* v. *Illinois State Bar Ass'n*, 389 U.S. 217, 223 (1967). *Accord*, *United Transp. Union* v. *State Bar*, 401 U.S. 576 (1971); *Brotherhood of R.R. Trainmen* v. *Virginia ex rel. Virginia State Bar*, 377 U.S. 1 (1964). Similarly, a statutory provision forbidding an employer organization from financing lawsuits by employees against their unions has been held unconstitutional because it violates the First Amendment rights of association and petition. *International Union UAW* v. *National*

Right to Work Legal Defense and Educ. Foundation, Inc., 433 F. Supp. 474, 481-482 (D. D.C. 1977).

In *Ernest W. Hahn, Inc.* v. *Codding*, 423 F. Supp. 913, 918 (N.D. Cal. 1976), one of the many cases holding that zoning litigation is within the scope of *Noerr-Pennington*, it was expressly held that:

> "... the allegation that defendants solicited others to bring lawsuits, standing alone or in conjunction with the charge that Codding brought sham lawsuits, [does not] create a claim cognizable under the antitrust laws."

Moreover, not one of the many other court decisions holding attempted or actual instigation of third-party litigation to be protected by *Noerr-Pennington* even mentions that such conduct might fall within the sham exception. *Semke* v. *Enid Automobile Dealers Ass'n*, 456 F.2d 1361, 1363 (10th Cir. 1972); *Rush-Hampton Indus.* v. *Home Ventilating Inst.*, 419 F. Supp. 19, 23 (M.D. Fla. 1976); *Bethlehem Plaza* v. *Campbell*, 403 F. Supp. 966, 968 (E.D. Pa. 1975); *First Delaware Valley Citizens Television, Inc.* v. *CBS, Inc.*, 398 F. Supp. 917, 923 (E.D. Pa. 1975); *Brackens Shopping Center, Inc.* v *Ruwe*, 273 F. Supp. 606, 607 (S.D. Ill. 1967).

Petitioners suggest no reason for reviewing, much less departing from, these well-established, well-understood and evenly-applied principles.

The third party issue is not only irrelevant under *Noerr* and under the Constitution, it is also irrelevant as a matter of ordinary logic. What possible practical difference could it have made if respondents had also appeared as plaintiffs in the state court actions? Petitioners imply that they

could then have "expeditiously expose[ed] the frivolousness of the litigation to which [they had] been subjected" (Pet. p. 19). But exposure of respondents' "frivolousness" would not have affected the interests of the other, actual, plaintiffs, whose standing to pursue their state court actions has never been quesioned. Whether or not the respondents were named as plaintiffs, the litigations would have proceeded just as they did.[9]

The motives of respondents in assisting the state court litigants are irrelevant under *Noerr-Pennington*.

The second strand of petitioners' position, that respondents fall outside of *Noerr-Pennington* because they intended the anticompetitive consequences of the litigations they sponsored, likewise raises no cert-worthy issue. The contention is disposed of by *Noerr* itself.

In *Noerr*, this Court acknowledged that attempts to influence government conduct may be motivated by the desire to gain a competitive advantage. But the Court held that such motive is of no moment. The whole point of *Noerr* was that the "legality [of attempts to influence government conduct] was not at all affected by any anticompetitive purpose [defendants] may have had." 365 U.S. at 140.

9. Petitioners argue that respondents had no standing to sue in the state court actions. This contention raises an issue of state law not addressed by the courts below and not worthy of Supreme Court review. Clearly, on the basis of the present record, no informed judgment could be made that respondents, or any of them, could not have framed complaints sufficient to proceed in their own rights. And, again, had respondents joined as plaintiffs and then been dismissed for lack of standing, the state actions nevertheless would have proceeded just as they did.

In undertaking to assist the local property owners challenge to petitioners' zoning amendments, respondents obviously knew that one effect of such litigation could be a delay in construction of petitioners' shopping center, to respondents' competitive advantage. Neither this knowledge, nor the anticompetitive motive it suggests, raises unique *Noerr-Pennington* issues. The law is clear that anticompetitive motive is irrelevant.[10]

As this Court reiterated in *Pennington*, "Nothing could be clearer . . . than that anticompetitive purpose did not illegalize the conduct [in *Noerr*]." 381 U.S. at 669. As stated in *Noerr*, "To hold that the knowing infliction of [anticompetitive] injury renders the campaign itself illegal would thus be tantamount to outlawing all such campaigns" (365 U.S. at 143-44). As stated in *Adolph Coors, Co.* v. *A&S Wholesalers, Inc.*, 561 F.2d 807, 812 (10th Cir. 1977), anyone making "a genuine attempt to secure a decision from the court on the merits" is protected by *Noerr-Pennington.*

10. Petitioners quote extensively from the alleged transcripts of attorney/client communications they have somehow obtained to establish the proposition that some respondents desired to delay construction of the new shopping centers. These documents are irrelevant to the summary judgment issue. The transcripts appear only as exhibits to the disallowed proposed amended complaint, filed after summary judgment was granted. A District Court may decide a summary judgment motion only on the facts and arguments on the record before it. *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 157 n. 16 (1970). However, the quotations contradict the very purpose for which they are selectively cited. Thus petitioners quote respondent Eagan as having told his attorney that "first of all, we hope we can stop them dead; if not, we can delay . . ." (p. 22). Whatever Eagan's motives as to delay, his objective "first of all" was to win a lawsuit and thereby "stop them dead." But there is no need to debate primary or secondary motive, for motive does not affect the application of *Noerr-Pennington.* Accordingly, as found by both courts below, these transcripts add nothing to petitioners' case.

If the easy allegation of impure motive were sufficient to remove litigations with anticompetitive implications from the ambit of *Noerr-Pennington*, there would be no practical protection for any such adjudicatory effort to redress a grievance, since some impure motive can always be alleged, and, realistically, can usually be demonstrated. But no court has ever held that purity of heart is a precondition for the *Noerr-Pennington* doctrine. Petitioners do not cite a single case holding that a serious attempt to obtain judicial resolution of a real dispute is rendered illegal by the presence of some anticompetitive motive. Any such holding would have issued in flat disregard of this Court's clear and simple doctrine: the Sherman Act does not apply to honest efforts to petition the government, whatever the motive for, and whatever the consequences of, such petitioning.

II

Denial of petitioners' post summary judgment motion to alter and amend the complaint does not merit further review since such denial was within the sound discretion of the trial court.

Petitioners "raise their objection" to the District Court's denial of leave to replead as one of their "questions presented" herein (p. 3). It is not clear whether they in fact assert this as an appropriate question for certiorari. Having "raised their objection," petitioners make no effort anywhere in their brief (1) to argue that the trial court abused its discretion or (2) to demonstrate that this matter is worthy of review on certiorari.

Petitioners sought no leave to amend their complaint until after summary judgment had been granted against them. They then sought relief under the stringent discretionary standards of a motion to alter judgment under Rule 59(e), *Swan* v. *Board of Higher Education,* 319 F.2d 56, 61 (2d Cir. 1963). Denial of a Rule 59(e) motion is reversible only where there has been an abuse of discretion, *Komie* v. *Buehler Corp.,* 449 F.2d 644, 647-48 (9th Cir. 1971).

Petitioners are apparently well aware that this Court does not regularly sit to review discretionary decisions of trial courts. The Second Circuit has already reviewed this issue and determined that the District Court did not abuse its discretion (p. A-2).

The District Judge noted that, on oral argument of the motion for summary judgment, petitioners conceded that the original complaint contained all material facts relating to their claim (p. A-31). The court found that, consistent with that concession, the proposed amended complaint added no relevant facts "not assumed to be in the original complaint." It concluded that granting the motion to alter judgment would "result in a futile, useless gesture." The Second Circuit expressly concurred in this judgment (p. A-2). Petitioners make no effort to demonstrate any abuse of discretion, and do not even brief the issue in their petition. There is no reason why certiorari should be granted on this point.

Conclusion

For the foregoing reasons, the petition for writ of certiorari should be denied.

Dated: New York, New York
November 2, 1978

Respectfully submitted,

SIMON H. RIFKIND
Attorney for Respondents Eagan Real Estate, Inc., Eagan Real Estate Management Corp., Eagan Real Estate, Leo T. Eagan, William Eagan, Edward Eagan, Kimbrook Corp., Paul D. Lonergan, Katherine M. Shea and John Murphy
345 Park Avenue
New York, New York 10022
(212) 644-8602

PAUL, WEISS, RIFKIND, WHARTON & GARRISON
MARK H. ALCOTT
NEAL JOHNSTON
Of Counsel